



POLICE DEPARTMENT

-----X
In the Matter of the Disciplinary Proceedings :
- against - : FINAL
Police Officer Richard Haste : ORDER
Tax Registry No. 947066 : OF
Fleet Services Division : DISMISSAL
-----X

Police Officer Richard Haste, Tax Registry No. 947066, Shield No. 20875, Social Security No. [REDACTED] having been served with written notice, has been tried on written Charges and Specifications numbered 2012-7616, as set forth on form P.D. 468-121, dated April 22, 2015, and after a review of the entire record, has been found Guilty of Specification Nos. 1 and 2; and Specification No. 3 is dismissed.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Richard Haste from the Police Service of the City of New York.

A handwritten signature in blue ink that appears to read "James P. O'Neill".
JAMES P. O'NEILL
POLICE COMMISSIONER

EFFECTIVE: March 28, 2017



POLICE DEPARTMENT

March 28, 2017

In the Matter of the Charges and Specifications : Case No.
- against - : 2012-7616
Police Officer Richard Haste :
Tax Registry No. 947066 :
Fleet Services Division :

At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable Rosemarie Maldonado
Deputy Commissioner Trials

APPEARANCE:

For the Department: Nancy Slater, Esq. & Beth Douglas, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

POLICE OFFICER RICHARD HASTE**Charges and Specifications:**

1. Said Police Officer Richard Haste, assigned to the 47th Precinct, while on-duty, on or about February 2, 2012, at [REDACTED], Bronx County, exercised poor tactical judgment leading up to the discharge of his firearm, and with the intent to cause serious physical injury to Ramarley Graham, did cause the death of Ramarley Graham, by shooting him. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

2. Said Police Officer Richard Haste, assigned to the 47th Precinct, while on-duty, on or about February 2, 2012, at [REDACTED], Bronx County, exercised poor tactical judgment leading up to the discharge of his firearm, resulting in the death of Ramarley Graham. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

3. Said Police Officer Richard Haste, assigned to the 47th Precinct, while on-duty, on or about February 2, 2012, in Bronx County, did discharge his firearm outside Department guidelines. *(Dismissed)*

P.G. 203-12 – DEADLY PHYSICAL FORCE

REPORT AND RECOMMENDATION

The above named member of the Department appeared before me on January 17, 18, 19, 20 and 23, 2017. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department called Sergeant Ramkumar Jewth, Detective Andrew Jarvis, Detective Tyrone Horne, Police Officer Christopher Crocitto, Inspector Gregory Sheehan, Inspector Raymond Caroli and Sergeant John Flynn as witnesses. Respondent called Police Officer John McLoughlin, Sergeant Scott Morris, and retired Lieutenant Daniel Modell as witnesses and Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent guilty of the charged misconduct.

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FINDINGS AND ANALYSIS

This case involves the sequence of events leading up to the shooting death of 18-year-old Ramarley Graham in the bathroom of his home. While certain nominal issues of fact were the subject of some disagreement, most of the material facts presented to this tribunal at trial were not in dispute. Unless otherwise noted, what follows is a summary of relevant, uncontested facts.

On February 2, 2012, Respondent was assigned to the 47 Precinct Street Narcotics Enforcement Unit ("SNEU"). The SNEU team's six members were assigned to the following roles:¹ Sergeant Scott Morris, team supervisor; Officer Christopher Crocitto, sergeant's driver; Officers Andrew Jarvis and Tyrone Horne, observation post; and, Respondent and Officer John McLoughlin, prisoner van. The team wore civilian clothes under raid jackets emblazoned with the words "POLICE" on the front and "NYPD POLICE" on the back.² (Tr. 49-50, 611, 660-61, 775-77)

At approximately 1430 hours, Officers Jarvis and Horne were in an unmarked Lexus on the corner of E. 228th Street and White Plains Road observing a bodega, referred to as "The Icebox." This establishment was known as a site for illegal drug transactions. (Tr. 121-23, 184, 189-90, 661) A group of three young men, allegedly "walking with a purpose" in the vicinity of The Icebox, caught the attention of Officers Jarvis and Horne. The men were later identified as Person A, Person B and Ramarley Graham. (Department's Exhibit ("Dep't Ex.") 25 at 14, 42)

¹ Department protocol requires that for a team to go out on SNEU enforcement, there must be a minimum of seven officers on the team, all of whom are SNEU trained. In this instance, the team was short one member and neither Respondent nor McLoughlin were SNEU trained. As such, the team was in violation of then Administrative Guide Procedure 316-36, now incorporated into Patrol Guide procedure 212-116. (Tr. 50-53; Dep't Ex. 25 at 45)

² The Department requires that all members of a SNEU team, with the exception of the officers working the observation post, dress in uniform. (Tr. 51-52) The team was in violation of then Administrative Guide Procedure 316-36, now incorporated into Patrol Guide 212-116.

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As they continued to watch, Jarvis observed Graham, "continuously... adjust[ing]" the front waistband of his pants and Horne noticed him "holding something" with "both of his hands underneath his sweater." In their experience as police officers, these gestures were indicia that an individual might be carrying a concealed firearm. Jarvis and Horne then saw Graham quickly enter and exit The Icebox without making a purchase. Concerned that "something [was] up," they notified the SNEU team by radio *via* the TAC channel³ that they were observing, "three male blacks, possible firearm." (Tr. 124-29, 161-62, 186-90, 216; Dep't Ex. 25 at 6, 12, 27)

Jarvis and Horne made a U-turn to follow the three men onto East 229th Street. Their suspicions were further heightened when they observed Graham separate from the group, cross the street, and according to Horne, "check" one or two building doors while Persons A and B did the same on the opposite side of the street. When Persons A and B gained access to [REDACTED]

[REDACTED] they beckoned for Graham to join them inside. Graham complied. (Tr. 128-32, 156-59, 191-95) Shortly thereafter, one of the men looked out a window in the direction of two uniformed officers walking a foot post. After those officers passed [REDACTED] Graham exited the building. This led Jarvis and Horne to suspect that the men were deliberately evading the police. (Tr. 132-33, 160-63, 196-98)

Graham crossed the street again while allegedly adjusting his pants. At that moment, Jarvis observed what he believed to be the "rear slide portion, the hammer end of the firearm"⁴ in his waistband. (Tr. 133-34, 164) Jarvis had "no doubt" that this was a firearm. (Tr. 164) He immediately told Horne, "[t]hat's a gun." Horne looked up and also saw a "black object [that] appeared to be a firearm" in Graham's waistband. Horne advised the team over the TAC

³ TAC is a channel used to communicate specifically with those on a closed frequency, while Division is a channel used to communicate with all uniformed members of service assigned to a given radio zone. (Tr. 54)

⁴ According to the Firearms Discharge Review Board Report, at his Department interview, Jarvis reported observing the "butt handle" of a firearm in Graham's right waistband. (Dep't Ex. 25 at 13)

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channel that Graham had a firearm and that he was walking on East 229th Street toward Barnes Avenue. Sergeant Morris sought confirmation that a firearm had been detected. Horne provided that confirmation after conferring once more with Jarvis. Relying on Horne's statement, Sergeant Morris directed the team to proceed to Graham's location. (Tr. 134-35, 198-200, 219, 232-35, 263-65, 663-65, 779-80)

Respondent and McLoughlin headed toward Barnes Avenue on East 229th Street. Horne radioed the prisoner van and informed them that they had just passed the suspect on the street. Respondent immediately stopped the van and he and McLoughlin exited to apprehend Graham. As he "jumped out," Respondent dropped his radio. (Tr. 201, 615-16, 782-84) Meanwhile, Jarvis and Horne proceeded to [REDACTED] where Person A and Person B had remained. Those individuals were frisked. No weapons were discovered. (Tr. 137-40, 169-71, 202-05, 221-22)

Respondent spotted Graham on the sidewalk. Despite Respondent's directive to stop, Graham entered [REDACTED]⁵ Graham briefly glanced over his shoulder before crossing the threshold and closing the door behind him. The officers later learned that this was Graham's residence. (Tr. 166, 201, 618, 783, 827-28; Dep't Ex. 1; Dep't Ex. 25 at 28, 38)

Respondent and McLoughlin trailed Graham to the front door of [REDACTED] Respondent attempted to open the front door, and even kicked it, but it was locked and he was unable to gain entry. According to Respondent, when he looked through the glass portion of the front door, he observed Graham climbing the interior staircase.⁶ (Tr. 783-84, 827-29, 854, 857; Dep't Ex. 1)

⁵ The Firearms Discharge Review Board Report notes that civilian witness Monique Coppin heard the officers yell, "Stop. Police" several times. (Dep't Ex. 25 at 15-16)

⁶ At his August 21, 2013 Department interview, Respondent stated he last saw Graham at a door on the [REDACTED] floor. (Tr. 854-55; see also Dep't Ex. 25 at 28)

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Respondent walked away from [REDACTED] to retrieve his radio from the van and proceeded to the rear of the premises. Once in the backyard, Respondent switched over to the TAC channel. (Tr. 784-87) Meanwhile, McLoughlin remained at or about the vicinity of the front entrance. While at the front door, he rang the bell, kicked the door and also looked through the glass, but was unable to enter or see Graham. (Tr. 618-19, 635, 651) Sergeant Morris and Crocitto arrived as McLoughlin was trying to gain entry. Sergeant Morris asked if the suspect had entered the premises, but gave no direction to the officers. (Tr. 618, 635-36, 652, 666, 675, Dep't Ex. I)

In the backyard, with his firearm drawn, Respondent took note of the rear windows and two back doors. When he approached the basement door, the tenant told him he had to "go through the front" to access the first floor vestibule. Respondent did not ask the tenant anything about Graham or the building layout. (Tr. 787-89, 834) A second rear door opened and a small child appeared followed by an older man, Person C. Respondent asked, in sum and substance, "if there was a teenager upstairs that lived there." According to Respondent, Person C simply pointed upwards with one finger and "kind of indicat[ed] ... a nod almost" with his head. (Tr. 789-91)⁷ Believing this gesture confirmed that Graham was upstairs, Respondent asked permission to enter the apartment.⁸ (Tr. 791, 835; *see* Dep't Ex. 25 at 28, 38) Again, Respondent did not obtain any other information about Graham, the building or its occupants. Furthermore, because nearly three minutes had elapsed since he had seen Graham go up the interior stairs, Respondent was uncertain of the suspect's location. (Tr. 791-93, 799, 833-34)

⁷ The Firearms Discharge Review Board Report indicates that in his Department interview Respondent told investigators that in response to his question, Pers. C "reluctantly informed him that there was a teenager who lived in an upstairs apartment." (Dep't Ex. 25 at 28, 38)

⁸ According to the Firearms Discharge Review Board Report, Pers. C had filed a lawsuit claiming that this was an unlawful entry (Dep't Ex. 25 at 44)

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Respondent alerted the SNEU team over the TAC channel that he had entered the premises and would let them in through the front door. He briefly scanned Person C's apartment, looking only "left and right" for any threats, and then opened the front door for McLoughlin and Crocetto to enter. Respondent testified that he was unaware of Sergeant Morris's whereabouts at that time. (Tr. 791-93, 838-39; Dep't Ex. 1 at 3:01:21-3:03:50)

Seconds after Respondent entered the premises, Sergeant Morris proceeded to the backyard, where he saw that the back door was being held open by a young boy. Walking inside the rear door, Sergeant Morris asked Person C if anyone had "come into his apartment or was in there now." Person C said no. (Tr. 668, 678-80)

Surveillance video captured the SNEU team as they attempted to enter [REDACTED]

[REDACTED] The video established that approximately three minutes and twenty-two seconds transpired from the time Graham entered [REDACTED] to the time McLoughlin and Crocetto entered the premises through the front door. Approximately one minute and thirty-eight seconds after the officers entered, a detective arrived responding to a "shots fired" call. The following is a summary of the relevant video content:

- 3:00:27-3:00:31 (front view) - Graham walks up to the front door of [REDACTED] Street and proceeds inside. As he enters, he appears to glance over his shoulder.
- 3:00:33 (front view) - Respondent rushes to the door, opens the screen door and appears to try the doorknob before kicking the door.
- 3:00:36 (front view) - McLoughlin first appears standing behind Respondent before moving to the driveway.
- 3:00:40-3:00:58 (front view) - Respondent continues to try the doorknob and peers through the glass portion of the door. Respondent turns to McLoughlin before Respondent walks toward the prisoner van.
- 3:01:08 (front view) - Sergeant Morris appears by the driveway.
- 3:01:10-3:01:27 (front view) - McLoughlin tries the doorknob and looks inside. Sergeant Morris is behind him and holds the screen door before moving to the driveway.
- 3:01:30-3:02:35 (rear view) - Respondent is at the rear of the house. He moves in and out of camera view as he approaches the house and then moves backward.

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- 3:01:32- 3:02:34 (front view) - McLoughlin back kicks the door three times but does not gain entry. He remains at the frontdoor for a full minute, alternating between peering throughthe glass andlooking backtoward Sergeant Morris.
- 3:02:40 (rear view)- Respondent approaches a rear door, which is then opened.
- 3:03:00(rear view)- The top ofRespondent's head is seen as he appears to be engaged in a conversation with Person C.
- 3:03:20(rear view) - Respondent proceeds through the rear door.
- 3:03:28 (rear view) - Sergeant Morris enters the premises through the rear door.
- 3:03:44-3:03:54(front view) - McLoughlin and Crocitto enter the premises through the front door.
- 3:05:32 (front view) - An officer from the Detective Squad arrives and enters. responding to a "shots fired" call.
- 3:06:10 (front view) - Morris emerges from the front door. Additional officers respond in the minutes that follow.

Once inside [REDACTED] Respondent led the way up the stairs. (Tr. 619, 794-95)

When he reached the second floor landing, he observed an apartment door to the left of the stairs.

Further down the hallway, Respondent saw that two couches had been placed on their sides.

Respondent made no attempt to investigate the bulky furniture blocking the end of the second floor hallway as well as access to the third floor staircase. Instead, Respondent stopped to the left of the apartment door, by the doorjamb, and McLoughlin stopped to its right, by the doorknob. (Tr. 277, 620-21, 639-40, 795-96, 804, 840-41; Dep't Exs. 20, 21)⁹ Respondent testified that as he ascended the stairs he did not know Sergeant Morris's whereabouts. (Tr. 794-95, 839) Sergeant Morris and Officer Crocitto had followed Respondent upstairs. Morris was situated at or about the upper portion of the staircase while Crocitto was situated near the bottom. (Tr. 241-43, 619-20, 669)

Respondent recalled hearing shuffling behind the second floor door after McLoughlin knocked and announced, "Police, open up." There was, however, no verbal response.¹⁰ (Tr. 800-

⁹ Unlike his fellow officers, Respondent claimed he was unaware that there was a third floor. McLoughlin, on the other hand, acknowledged seeing the stairs that led to a third floor. (Tr. 244-45, 634, 639, 795-96, 840-41)

¹⁰ Though Crocetto, who was near the bottom of the stairs, also testified that he heard movement inside the second floor apartment, McLoughlin, who was next to Respondent, denied hearing anything inside the apartment. (Tr. 244, 645)

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01) At that moment, neither Respondent nor McLoughlin knew whether Ramarley Graham was actually inside that apartment. (Tr. 633-34, 841) They also had no knowledge concerning the apartment layout or information about its other occupants. (Tr. 814, 844, 850-51) Specifically, Respondent testified at trial that he considered implementing Patrol Guide 212-38, for Hostage/Barricaded Persons, but rejected its applicability. (Tr. 798 99)

Respondent recounted that when McLoughlin looked at him and asked, "Are you ready?," he replied, "Yes."¹¹ Respondent interpreted this to mean that McLoughlin was about to breach the entrance. As anticipated, McLoughlin then back kicked the door, opening it with a single strike. Both Respondent and McLoughlin conceded that they did not ask for, nor did they receive, direction from Sergeant Morris prior to breaching the door. (Tr. 622-23, 628-29, 670, 785-86, 794-96, 802-03, 842-43)

Respondent entered the second floor apartment first, firearm drawn. McLoughlin followed, also with his gun drawn. (Tr. 623-24, 644, 804-06, 843) Respondent stated that upon entry, he quickly scanned left and right and "saw what looked to be a corner of a wall... to stand behind," giving him "some vantage, some ability to cover." (Tr. 806, 811)¹² He immediately observed Graham at the opposite end of the apartment hallway and commanded him to show his hands. According to Respondent, Graham said, "fuck you, get the fuck out of my house" as he moved toward the officers with his hands in his waistband. Graham then stepped to his left into what was later discovered to be the bathroom. (Tr. 806-07, 810, 850; Dep't Ex. 2)

The bathroom door remained open as Respondent approached with his firearm trained on Graham. According to Respondent, he again directed the teenager to show his hands but

¹¹ McLoughlin did not recall this exchange. Both Morris and Crocito testified that they did not hear any such remarks. (Tr. 272, 643 44, 669 70)

¹² Respondent stated on cross-examination that he recalled specifying that he went to that corner upon entry during his GO 15 interview but acknowledged that "apparently reviewing the documentation I didn't see the initials of where my initial point of entry was or initial point after entry was." (Tr. 845-46) The narrative of Respondent's GO-15 statements in the FDRB Report makes no reference to a corner or outcropping of the wall. Respondent also clarified on cross that the outcropping or corner did not provide cover, only concealment. (Tr. 849)

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Graham allegedly shoved his hand further into his waistband.¹³ Respondent then yelled, "gun, gun" before firing one shot which struck Graham in the chest.¹⁴ (Tr. 58, 245-46, 625-27, 671, 810, 815-18)

After the shot, Respondent stepped back and McLoughlin pulled him toward the apartment doorway. They did not know whether Graham had been struck, so they took a "position of concealment" in the hallway with their firearms drawn. (Tr. 627-28, 647-48, 818-21) At some point after the shooting, Respondent noticed a woman and child at the end of the hallway. (Tr. 819-20, 859)

Sergeant Morris, who was at the top of the stairs near the apartment door, verified that his officers were not injured. Like Respondent, Morris noticed Graham's boots sticking out of the bathroom entrance. After confirming there was no active threat in the apartment, Morris checked on Graham and called for EMS and additional units. Crocitto rushed to the third floor, maneuvering past the furniture in the second floor hallway. He cleared the third floor apartment and verified that an older woman at that location was "okay." (Tr. 247, 671-72)

At the scene, Respondent told Sergeant Morris that Graham "was reaching. . ."¹⁵ Respondent explained that this was "police talk" which meant "reaching for a firearm." (Tr. 823) Respondent was ultimately directed to exit the apartment and turn his firearm over to a supervisor. (Tr. 672, 822) Ramarley Graham was pronounced dead at Montefiore Hospital. (Tr. 57-58)

¹³ Respondent testified at trial that Graham's last words before the shooting were "suck my dick." (Tr. 816) The weight of the credible evidence indicates, however, that Respondent did not previously make this claim at his Department interview. (Dept. Ex. 25 at 29, 38)

¹⁴ Though the officers on the scene all testified to hearing Respondent command Graham to show his hands, the Firearms Discharge Review Board Report notes that Graham's grandmother, [REDACTED] who was inside the apartment, told IAB investigators that she did not hear any of the officers issue verbal commands. The grandmother [REDACTED] of called as a witness at trial. (Dep't Ex. 25 at 14-15)

¹⁵ At his GO-15 interview and at trial, Morris recalled that Respondent stated, "Sarge, I thought he was reaching." (Tr. 691-92; Dep't Ex. 25 at 10, 39)

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A Department investigation commenced immediately and the location was sealed. No firearm was recovered from Graham's person or from the premises, which was searched pursuant to a warrant. A bag of marijuana was recovered from the apartment toilet. (Tr. 59-60, 112; Dep't Ex. 25 at 19, 37, 45; Respondent's Exhibit ("Res. Ex.") A) The SNEU team members, with the exception of Respondent, were interviewed on the day of the shooting. (Dep't Ex. 25 at 9-14)

The Bronx District Attorney's Office investigated the incident. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Department's Firearms Discharge Review Board ("FDRB") conducted a review of this incident. In a report that was finalized on April 3, 2015, the FDRB determined that Respondent did not violate Department guidelines in discharging his firearm, but found that he did exercise poor tactical judgment and recommended service of the instant Charges and Specifications. (Tr. 70-71, Dep't Ex. 25)¹⁶

At issue is whether Respondent's chosen tactics were so deficient that they led to a firearm discharge that could have been avoided but instead resulted in a death. Specifically, Respondent stands charged with: (i) exercising poor tactical judgment leading up to the discharge of his firearm, and with intent to cause serious physical injury, [causing] the death of

¹⁶ The FDRB Report also found that Sergeant Morris: (i) exercised poor tactical judgment; (ii) failed to supervise his subordinates; and (iii) violated SNEU procedural and training guidelines, and that Officer McLaughlin exercised poor tactical judgment. Charges and Specifications are presently pending against both members of service. (Tr. 96 98, 629-30, 672-73, Dep't Ex. 25 at 46-47)

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Ramarley Graham by shooting him; and (ii) exercising poor tactical judgment leading up to the discharge of his firearm, resulting in the death of Ramarley Graham.¹⁷ For the reasons set forth below, I find that Respondent engaged in the charged misconduct.

It is well established law that to impose a disciplinary sanction against an officer, there must be some showing of fault on an officer's part, either that he acted intentionally, unreasonably or negligently. *See Disciplinary Case No. 2015-13936* (Sept. 13, 2016), *citing, McGinigle v. Town of Greenburgh*, 48 N.Y.2d 949 (1979); *Reisig v. Kirby*, 62 Misc. 2d 632 (Sup. Ct., Suffolk County 1968), *aff'd*, 299 N.Y.S.2d 398 (2d Dep't 1969). Mere errors of judgment, lacking in willful intent and not so unreasonable as to be considered negligence, are not a basis for finding misconduct. *See Ryan v. New York State Liquor Auth.*, 79 N.Y.S.2d 827 (3d Dep't 1948); *Dep't of Sanitation v. Rizzo*, OATH Index No. 1423/06 (Sept. 26, 2006); *Dep't of Correction v. Messina*, OATH Index No. 738/92 (July 9, 1992). To satisfy this burden of proof, the Department must prove that Respondent intentionally violated a procedural rule or was careless in his duties in some respect. *See Case No. 2015-13936*, *supra* at 14. Absent such a showing of fault, no misconduct can be found. *Dep't of Correction v. Caldwell*, OATH Index No. 2702/14 (May 27, 2015), *citing, Dep't of Sanitation v. Beecher*, OATH Index No. 176/01 at 4 (Mar. 7, 2001), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 02-05-SA (Mar. 20, 2002).

¹⁷ Though both specifications are predicated on grave tactical errors, the elements in Specification I mirror those of criminal manslaughter in the first degree under the Penal Law. *See N.Y. Penal Law § 125.20[1]* ("A person is guilty of manslaughter in the first degree when (1) [w]ith intent to cause serious physical injury to another person, he causes the death of such person") New York criminal courts have inferred intent to cause serious injury from the defendant's conduct, the surrounding circumstances and the medical evidence. *People v. Wise*, 46 A.D.3d 1397, 1399 (4th Dep't 2007); *People v. White*, 216 A.D.2d 872 (4th Dep't 1995), *citing, People v. Steinberg*, 79 N.Y.2d 673 (1992). Specifically as to gunshots, courts have found that the very act of firing a weapon can give rise to an inference of intent. *Todd v. Berry*, 1988 U.S. Dist. LEXIS 10664 (S.D.N.Y. 1988) ("In this case, one can reasonably infer that [there was] intent to cause serious injury. Firing a lethal weapon at another human being clearly gives rise to an inference of a desire to inflict serious physical harm. . . ."); *see People v. Lara*, 85 A.D.3d 487 (1st Dep't 2011) (finding "no reasonable view of the evidence" that defendant did not intend to cause serious physical injury where shots were fired at victim deliberately at close range. The court reasoned that there was intent to cause, "at least, serious physical injury, a natural consequence" of shooting at close range.) I find that this precedent is applicable to the case at hand in that it is reasonable to infer that Respondent's shot at close range was intended to cause serious physical harm.

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Patrol Guide 203-11, which was applicable at the time, specifically sets forth the Department's policy that all uniformed members of service are "responsible and accountable for the proper use of force under appropriate circumstances" and should use only "minimum necessary force." As set forth in the record, tactics are "the physical application of the Department's policies and procedures, how it is we actually go about doing the job of police work." (Tr. 289) The NYPD seeks to minimize risk by putting in place tactics as a mechanism to preserve the life and safety of both officers and civilians.

In situations that do result in the use of force, administrative tribunals and courts alike have been reluctant to "closely second guess the split second decisions of officers in difficult circumstances." Instead, courts analyze whether an officer's conduct was objectively reasonable. See *Graham v. Connor*, 490 U.S. 386, 396 (1989), citing *Terry v. Ohio*, 392 U.S. 1 (1968) ("[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain and rapidly evolving --about the amount of force that is necessary in a particular situation."); *Police Dep't v. Seery*, OATH Index No. 1483/00 (Aug. 17, 2000); *Police Dep't v. Bolusi*, OATH Index No. 583/92 (June 5, 1992), *mod. on other grounds*, Comm'r Decision (Oct. 1, 1992); see also *City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015) ("[I]t is reasonable for police to move quickly if delay would gravely endanger their lives or the lives of others. This is true even when, judged with the benefit of hindsight, the officers may have made some mistakes. The Constitution is not blind to the fact that police officers are often forced to make split-second judgments."). A reasonableness inquiry requires thoughtful consideration of the specific facts and circumstances

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of the particular case, including, but not limited to, the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers or others, and whether the suspect was attempting to evade arrest by flight. *Koeiman v. City of N.Y.*, 36 A.D.3d 451 (1st Dep’t 2007), citing *Graham*, 490 U.S. 386 at 396.

The Department Advocate presented the expert testimony of Inspector Gregory Sheehan, the Commanding Officer of the Police Academy’s Specialized Training Section, to describe how Respondent’s poor tactical choices precipitated the death of Ramarley Graham.¹⁸ The weight given to expert opinion evidence is ordinarily within the province of the tribunal charged with deciding the facts. *Comm’r of Welfare v. Simon*, 20 A.D.2d 865, 866 (1st Dep’t 1964); see Prince, Richardson on Evidence § 7-305 (Lexis 2008). The expert’s qualifications are one factor to be considered. *Felt v. Olson*, 74 A.D.2d 722 (4th Dep’t 1980), aff’d. 51 N.Y.2d 977 (1980). However, “[expert] testimony may be rejected by the trial court if it is improbable, in conflict with other evidence or otherwise legally unsound.” *Desnoes v. State of N.Y.*, 100 A.D.2d 712, 713 (2d Dep’t 1984)

This tribunal found Inspector Sheehan to be an exceptionally qualified and unbiased witness who was well-versed in Department policies, procedures, tactics and training. As such, he presented this tribunal with a cohesive, fact-based and reasoned examination of Respondent’s course of conduct. Inspector Sheehan’s analytic framework, which applied Department tactics to the specific facts of this case, persuaded this tribunal that Respondent engaged in the charged misconduct when he recklessly ignored applicable tactics, failed to make proper notifications and instead chose to speed up the process of apprehension, rather than slow it down, thereby creating

¹⁸ Prior to his current assignment, Sheehan worked in the Internal Affairs Bureau for several years, where at one point he served as Executive Officer of the Force Investigation Unit. He also spent a period of time working in the Office of Management, Analysis and Planning as the Special Projects Lieutenant, describing his duties as “policy planning, management, analysis work,” and “promulgating and developing new Department procedures and revising old ones . . .” (Tr. 284-89; Dep’t Ex. 26)

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a situation of great peril for both members of service and civilians. This tribunal took particular note of Inspector Sheehan's unsettling assessment that during his many years with IAB and the Police Academy, he had never seen tactical violations as egregious as those in this case. (Tr. 451)

At the outset of his testimony, Inspector Sheehan confirmed that NYPD tactics were part of Respondent's 2008 Police Academy training. (Tr. 289-94, 445-46) Indeed, Respondent completed a twelve day training program from the Firearms and Tactics Section. Part of the curriculum included a lesson entitled "Patrol Tactics." The lesson plan for this section specifically provided that:

If a dangerous suspect is isolated in a room, close off avenues of escape and await assistance. Time is an important police ally and should be used to minimize injury to police/community. Frequently, actions taken during the initial minutes at the scene of a crime are critical. Containing the situation provides the opportunity to gather intelligence, formulate a plan, call for additional personnel and specialized units, (e.g. H.N U., E.S D.), or perform any other tasks which will enhance the protection of life and property. (Tr. 476; Dep't Ex. 30 at 16)

At trial, Inspector Sheehan also read from the Use of Force chapter in the NYPD Student's Guide that was in effect when Respondent was a recruit. The Guide contemplated that officers can, at times, "unnecessarily forc[e] . . . [confrontations] and . . . create . . . circumstances" that place them unnecessarily in harm's way by "using poor tactics or by violating other Department procedures." From the outset, those recruits were specifically cautioned as follows:

Because the Department takes its responsibility to protect life so seriously, officers who have to hurt or kill people to get themselves out of danger that they should have avoided by using proper tactics are very likely to be disciplined . . . in Departmental proceedings, the focus also is upon the tactics used by officers immediately prior to the use of force and upon whether improper tactics contributed to the need for force that could otherwise have been avoided . . . In such cases, the Department and officers also lose in terms of public trust and credibility. Citizens expect that we will act with restraint and concern and that we

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will do whatever is possible to avoid having to resort to the use of force. This is especially true in the case [of] . . . angry kids . . . and others who are not hardened criminals. . . . Regardless of whether [force used] is legally justifiable, the use of force in situations in which officers have engaged in unnecessary confrontations or otherwise used bad tactics . . . damages our relationship with the whole community . . . Good tactics save lives . . . We value good tactics highly, and will expect you to use them in every encounter you have. (Dep't Ex. 27 at 4-5)

Inspector Sheehan noted that Respondent would have received further extensive classroom and interactive, scenario-based training emphasizing these fundamental precepts which are engrained in the Department's use of force policies. (Tr. 294, 397-402) In short, the Department anticipates scenarios similar to those at issue here and provides extensive training to officers emphasizing the importance of tactics to avoid unnecessary risk.

At trial, Inspector Sheehan explained that it is the responsibility of officers to know their procedural duties, including those set forth in Patrol Guide 212-38 for Hostage/Barricaded Persons, and that these procedures are "highlighted frequently" in training. (Tr. 289-94, 445-46) He noted that Patrol Guide 212-38, which was in effect at the time of the incident, outlined how officers should proceed in responding to scenes where "persons are being held hostage," or where "barricaded persons will not voluntarily surrender" with the purpose of ensuring "maximum safety to all persons concerned." (Dep't Ex. 28) Although the Patrol Guide does not have a specific section defining "barricaded person," Inspector Sheehan explained that a situation with a perpetrator who does not have a hostage but is behind some sort of physical barricade, such as a bedroom or apartment door, falls under 212-38. (Tr. 296-97)

Inspector Sheehan opined that the pursuit of Graham began to "fit" into a "barricaded job," "a moment or two" after Graham entered the front door of the multiple dwelling and the front door locked behind him. (Tr. 315-16, 321, 358) When a barricaded person is refusing to voluntarily surrender, the Patrol Guide outlines the following steps for uniformed officers:

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1. Request through communications dispatcher that the patrol supervisor, Emergency Services Unit (E.S.U.), Hostage Negotiation Team (H.N.T.) and the Technical Assistance Response Unit (T.A.R.U.) respond to the incident.
2. Seek cover and attempt to isolate and contain the subject.
3. Be cognizant of the danger of "Mass Reflexive Response."
 - a. The first officers on the scene will immediately establish and maintain firearms control.
4. Attempt to slow the pace of the incident and establish a dialogue with the subject while awaiting the arrival of specialized personnel.
 - a. Any action which might agitate or provoke the subject should be avoided.
5. Refrain from any action which would unnecessarily jeopardize the safety of the hostage.
6. Establish police lines to control subject's mobility and to prevent uninvolved persons from entering the area.

The procedure further explains that, "The ranking patrol supervisor on the scene is in command and will coordinate police operations. If a barricaded person is contained and poses no immediate threat or danger to any person, no additional action will be taken without the authorization of the precinct commander/duty captain at the scene." In a *Note*, the Patrol Guide adds, "When there is time to negotiate, all the time necessary to ensure the safety of all individuals concerned will be used." As set forth below, the preponderance of the credible evidence presented established that Respondent abided by none of these critical steps in the early stages or throughout this incident.

At trial, Inspector Sheehan enumerated Respondent's multiple tactical errors and explained how his actions repeatedly put both officers and civilians in harm's way. The first issue noted was that, after Respondent was unsuccessful in gaining entry through the front door, he walked to his vehicle to retrieve the radio he had dropped. Because he was the first officer on the scene, leaving the front door unattended was especially problematic because there was a need to ensure a "constant visual" of the interior of the building. Failing to do so created missed opportunities to ascertain the exact position of a person he believed to be armed. (Tr. 316-17.

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DAO's expert also expressed serious concerns about the failure to establish a perimeter around [REDACTED] Inspector Sheehan explained that it is imperative for officers faced with a barricaded situation to establish police lines, also referred to as perimeters or "frozen zones," which prohibit other persons from entering the potentially unsafe location. The perimeter is also important for isolating and containing the suspect so that he cannot flee. Here, Respondent missed the mark at multiple junctures. For example, although Respondent took note of the doors and windows in the rear of the premises, all of which were avenues of potential escape for the suspect, he entered Person C's apartment before the requisite officers were in place to cover the rear. (Tr. 297-98, 324-25) As Inspector Sheehan next pointed out, Respondent completely eliminated what remained of a perimeter when he let McLoughlin and Crocitto into the building through the front door. By doing so, he left no police presence outside, again increasing the risk of an allegedly armed suspect exiting, or accomplices entering, the premises. (Tr. 330)

This tribunal notes that Respondent's failure in this respect reflects a striking lack of awareness of the gravity of the situation he was confronting. As underscored by Inspector Sheehan, over three minutes elapsed between the time Graham entered his residence and the time the officers gained entry. Instead of rushing in, Respondent should have been establishing police lines around the residence, warning radio dispatch of the pursuit of a potentially armed suspect in the area, requesting the response of Department resources for such occurrences such as E.S.U., H.N.T, T.A.R.U., seeking cover, and, at a minimum, attempting to maintain visual contact inside the building to establish where the suspect was located inside. (Tr. 321-24) By not following procedures, Respondent jeopardized the safety of everyone in that area including children in the building and the two uniformed officers who had been seen walking on [REDACTED].

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Inspector Sheehan took further issue with Respondent's statement that he "quickly" scanned Person C's apartment as he walked through. He asserted that a methodical search of Person C's residence was warranted to verify that the allegedly armed suspect was not hiding therein. (Tr. 326-27, 417-18) This tribunal notes that it is jarring that Respondent, believing this to be a potentially dangerous scene, allowed Person C to follow him back inside the premises and left a young boy holding open the rear door.

As Inspector Sheehan explained, Respondent's failure to conduct a "much more thorough interview" of Person C was another significant tactical error. Person C was a "potential source of information" who may have been able to provide critical intelligence such as: clarifying Graham's exact whereabouts, ascertaining whether Graham or other teenagers lived in the building, and, if so, in which specific apartments, whether they were known to carry firearms, the layout of the premises and whether there were any other hazards or special circumstances the officers might encounter once inside. Sheehan pointedly rejected Respondent's counsel's suggestion that additional investigative steps were impractical because "time [was] of the essence." In fact, it was Inspector Sheehan's opinion that "one of the tactical mistakes was speeding the process [of apprehension] up rather than trying to slow the process down." (Tr. 328-29, 418, 444-45) As noted above, Respondent's tactics training at the Police Academy explicitly reminded recruits that "[t]ime is an important ally and should be used to minimize injury to police/community." (Dep't Ex. 30 at 16) This tribunal concurs that by instead moving to immediately apprehend Graham, Respondent negligently ignored fundamental tenets of his police training and endangered both police officers and civilians.

Respondent's tactical failures were compounded when he led the officers upstairs and stopped at the door of the second floor apartment. Though Sheehan stated he did not know

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whether Respondent had simply "guessed" Graham's location, Respondent did not, in his view, "articulate well" why he believed Graham was there. This tribunal agrees with the opinion that, given what Respondent knew at the time, it was just as likely that the suspect had secreted himself in other parts of the building or had exited the premises altogether. (Tr. 421-22) Moreover, that Respondent was ultimately correct in his assumption about Graham's location, does not mitigate the egregious tactical risks he took by disregarding Department procedures and ignoring surrounding vulnerabilities.

For example, despite not having a reasonable basis for determining Graham's whereabouts. Respondent took no action concerning the furniture obstructing the end of the second floor hallway. An examination of Department's Exhibit 21 confirms that this furniture presented an apparent and potentially dangerous set-up, as the couches were positioned on their sides in a manner that blocked the entire area. This unusual arrangement of bulky furniture would have given a reasonable officer pause. Inspector Sheehan correctly surmised that there was no way to know if Graham, or others, had secreted themselves behind what looked like a hastily constructed fortification, or had placed it there to prevent access to the third floor. The tactically sound approach would have been to clear that obstructed area before fixating on the apartment door. (Tr. 339-40)

In sum, entering the second floor apartment under these circumstances was an egregious violation of the Patrol Guide. Inspector Sheehan concurred with this conclusion after reviewing Respondent's GO-15 statements and ascertaining that he presented no evidence of exigent circumstances, such as cries for help or gunshots, which could potentially justify an immediate emergency entry into the apartment. At trial, Respondent confirmed that he only heard shuffling inside the second floor apartment as he stood by the door. Therefore, having had no visual

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contact with the suspect for over three minutes, having only knowledge that the suspect had initially climbed the interior stairs, and having no evidence of imminent danger, a reasonable officer would have concluded that Graham was a barricaded person somewhere within the building and would have followed Patrol Guide 212-38. Accordingly, failing to call E.S.U. as required, and entering the apartment without authorization from a precinct commander or duty captain, constituted misconduct and a serious tactical error.¹⁹

Following the breach, the apartment's narrow hallway presented another tactical challenge that was mishandled. As Sheehan pointed out, there was "nowhere to go" to find cover or concealment from any threat that arose, particularly if the suspect started shooting. It is also important to note that by the time Respondent entered the apartment, the suspect had time to "gain ... a distinct tactical advantage" over the officers who were entering an unfamiliar location. (Tr. 343, 347-48) Given these circumstances, Inspector Sheehan asserted that the safer tactic would have been to "isolate and contain and seek cover." Specifically, the reasonably prudent action would have been to "back-pedal," taking cover on the stairwell landing, or, alternatively, traveling across the hallway outside another doorway where he could have taken cover and commenced isolation and containment procedures. (Tr. 349-51; Dep't Exs. 22-23)

This tribunal concurs with Inspector Sheehan's view that once Respondent encountered Graham within the apartment, his chosen tactics were especially imprudent and unsafe. The suspect had allegedly refused to comply with Respondent's order to show his hands and then secreted himself in the bathroom, moving out of Respondent's view and gaining further tactical advantage over Respondent. By moving toward the bathroom to accelerate an engagement with

¹⁹ Inspector Sheehan noted that not only did the officers on the scene not have the authority to breach the door, they also did not have the specialized training or equipment for this type of dynamic entry. (Tr. 342-46)

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Graham, Respondent violated a fundamental training principle known as M&M: maximizing distance and minimizing exposure. Under these circumstances, Inspector Sheehan contended that Respondent should have sought to maximize his distance from Graham, thereby minimizing exposure to any firearm discharge. He noted that the retreat and cover Respondent sought after discharging his firearm was the type of action he should have taken when he first entered. (Tr. 353-57, 450-51)

Though Sheehan acquiesced on cross-examination that officers can sometimes get injured while retreating, he noted that they are trained in "tactical retreat," keeping their firearms and eyes trained on the threat while "back-pedaling" to a safer location. (Tr. 437-38) Within this context, Respondent's comments about the dangers of retreat are particularly confounding. Especially noteworthy was his argument that it would have been "increasing the level of danger" to retreat because that maneuver would require him to walk backwards, possibly into another officer's firearm. (Tr. 800, 813) It is simply nonsensical to believe that Respondent truly thought that the risk of stumbling outweighed the risk of proceeding full speed ahead into a direct engagement with an armed suspect in complete contravention of his training. (Tr. 811-13)

As noted above, the tribunal found Inspector Sheehan, a longtime member of the Department who has served in various leadership roles, to be a very knowledgeable, credible and persuasive expert witness. Sheehan explained in a straightforward and logical manner why a reasonable police officer would have heeded the mandates of the "barricaded persons" Patrol Guide procedure. He not only pointed out the many instances of poor tactics in this case, but also explained why those tactics were deficient and what the objectively prudent course of action would have been. Moreover, his detailing of Respondent's recruit training emphasizing the importance of using sound tactics to avoid putting oneself in a position of having to

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unnecessarily resort to deadly force was particularly enlightening. In sum, Inspector Sheehan presented persuasive evidence that Respondent's analysis of this apprehension was seriously flawed. Accordingly, I concur with the expert's conclusion that Respondent's tactical violations were exceptionally egregious and that he acted in stark contrast to his training and Department procedures during his attempt to apprehend Graham.

Inspector Raymond Caroli was also called by the Department Advocate as an expert witness in this case. Inspector Caroli is the Commanding Officer of the Firearms and Tactics Section and was a voting member of the Firearms Discharge Review Board that issued the report in this matter. At trial, he agreed with Inspector Sheehan's assessment that the officers were confronting a barricaded person subject to Patrol Guide 212-38. Inspector Caroli highlighted Respondent's approach at the second floor door as a pivotal "flashpoint" (Tr. 470), thus echoing the following observation in the FDRB Report:

It is at this critical moment that the tactical decisions made at the scene would have the greatest impact on the subsequent firearms discharge. Securing the second floor residence and following the barricaded person/perpetrator protocols would have been a more prudent and appropriate tactical choice. (Dep't Ex. 25 at 31)

In Inspector Caroli's opinion, Respondent's failure to call E.S.U., and follow the Hostage/Barricaded Persons procedure, was a deeply flawed tactical judgment that needlessly violated existing safety protocols. (Tr. 470-76, 479, 518-19) This tribunal concurs.

The testimony of Sergeant John Flynn of the Emergency Service Unit further confirmed Sheehan and Caroli's assertions that E.S.U. should have been called as they were better equipped to handle this type of situation.²⁰ Flynn detailed that in a barricaded case E.S.U. officers are

²⁰ Sergeant Flynn is a twenty-year member of the Department with many years of experience in the Emergency Service Unit. Since late 2013, he has been assigned to the Emergency Service Unit Specialized Training School, where he supervises training for members newly assigned to E.S.U., as well as in-service training for currently assigned members. Flynn estimated he has been involved in "countless tactical assignments" and hundreds of search warrants, barricaded perpetrator and EDP jobs, in addition to participating in, instructing and supervising training on these types of scenarios. (Tr. 537-39, Dep't Ex. 32)

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trained to execute "a slow and methodical entry" to ensure safety. For example, when an apartment door is locked, a team of generally no less than six officers in SWAT gear would first take tactical control of the door by tying it to prevent it being opened from the inside -- allowing the team to assemble and stage operations. A ballistic shield would also be placed in front of the door for an additional layer of protection. Attempts would be made to establish a dialogue with the suspect without any defined time limits with the goal of establishing a rapport. Additionally, they would simultaneously reconfirm that the Hostage Negotiation Team and the Technical Assistance Response Unit were responding to further augment their already significant on-site capabilities. (Tr. 549, 556-64)

If unable to establish a dialogue, E.S.U. would set up for an emergency entry, including a possible door breach [REDACTED]

[REDACTED] He testified that even after setting up for a breach, the decision to force entry, absent emergency or exigent circumstances, would not lie with E.S.U. but with a "significantly higher" ranking member on the scene. Even when there was authorization to breach, breaching would not follow instantaneously. Communication would commence among the team to ensure that nonessential persons were out of the way, that areas of ingress and egress were clear and that all members were aware of any important intelligence or information about the entry. (Tr. 570 71)

It is impossible not to appreciate that the deliberate and cautious entry described by Flynn is the complete antithesis to the course of action chosen by Respondent in this situation. There was ample time, highlighted throughout Inspector Sheehan's testimony, for Respondent to utilize his radio to call communications and request assistance at the scene. Respondent's assertion that

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he believed he needed to first conduct a "preliminary investigation" because E.S.U. would have wanted specific information regarding Graham's location in the apartment rings hollow. Though it is true that Sergeant Flynn testified that E.S.U. officers would attempt to obtain as much information as possible from the officers on the scene, as noted above, Respondent negligently failed to conduct a thorough preliminary investigation when he spoke to Person C as well as the tenant residing in the basement apartment. Furthermore, E.S.U. would not require information that members of service could only obtain by violating Department directives. Regardless of the quality of information obtained, both Sheehan and Flynn confirmed that once requested, E.S.U. had no discretion as to whether or not to respond to a location. (Tr. 359, 552)

This tribunal concludes that at multiple junctures, Respondent made inexcusable tactical decisions that ultimately caused the death of Ramarley Graham. Specifically, by disregarding the barricaded person procedure, and choosing to not make mandatory radio requests. Respondent ignored his training and exponentially increased the risks to all involved. In sum, Respondent failed to adhere to NYPD procedures specifically designed to optimize safety and, instead, chose to unreasonably and carelessly expedite a direct encounter with a barricaded person he believed was armed.

In making this finding, this tribunal does not underestimate the commitment it takes for a uniformed member of service to confront a suspect carrying a firearm. I also note that Respondent's trial account of the fear he felt when he confronted Ramarley Graham was both palpable and compelling. Nonetheless, this tribunal cannot ignore that Respondent should have never obtusely pushed himself into this position to begin with. One of Respondent's primary tactical mistakes was speeding up the apprehension process instead of slowing the pace and awaiting mandated expert assistance. There were opportunities to do so at multiple points, as

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outlined above in the discussion of the experts' testimony. Instead, Respondent chose to venture a guess about the suspect's whereabouts and then blindly forged ahead without regard to procedures, mindlessly creating perilous situations and leading his team toward increasing dangers that they were neither authorized nor prepared to confront.

A finding of guilt here is consistent with prior rulings of this tribunal in which uniformed members of service have been found guilty of misconduct where it was determined that the dangerous situation the officer encountered was the result of acting outside Department procedures and tactics to expedite a confrontation with a suspect. *See Disciplinary Case No. 2007-82789* (March 23, 2012) (detective found guilty of unnecessarily stopping and engaging suspects, thereby placing his safety and that of others in jeopardy, and of discharging his firearm outside Department guidelines. The trial commissioner opined, “[Respondent] placed himself in a situation where he had no cover [and thus made a split-second decision to resort to deadly physical force]. . . . [Respondent’s] tactics were poor and he failed to assess the overall situation. . . . He unnecessarily attempted to single-handedly [effectuate a vehicle stop] in a manner that jeopardized the safety of himself and others.”); *Disciplinary Case No. 2000-75687* (Jan. 13, 2003) (finding police officer guilty of discharging his firearm at a moving vehicle without cause where hearing officer found that Respondent “unnecessarily rushed into a situation in which he believed that he had to discharge his weapon,” by placing himself directly in the path of the suspects, exposing himself to danger and not attempting to take cover, despite having time to do so).

In his defense, Respondent presented expert testimony from retired Lieutenant Daniel Modell, who served for several years as the coordinator of the Tactical Training Unit and for a time as the training coordinator of the Firearms and Tactics Section. Lieutenant Modell took the

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position that Respondent acted reasonably in his approach to this apprehension. On direct examination, he asserted, "If the officer believes that there's somebody who's got a firearm and may plan on using [it], the mandate is to stop that person, get that person . . . if he thought that the threat was active, if he thought that it was possible that other people might be hurt . . . you're not going to treat it as a . . . barricaded situation." He suggested that an officer would generally treat a situation as hostage/barricaded if it was "relatively controlled" and contended it was "not unreasonable" for Respondent to believe that "the situation was not controlled and there was the potential for danger both for his team . . . and for others who might have been present." (Tr. 716-18) Lieutenant Modell added later in his testimony that he did not think breaching the door and pursuing Graham into the apartment was the "only course" of action, simply that it was reasonable. He also acquiesced, however, that it would also have been "perfectly valid" to treat the situation as a barricaded job and call for E.S.U. (Tr. 752-54)

Similarly, as to Respondent's decision to pursue Graham into the bathroom, Modell asserted on direct that the "important tactical mandate is to control or manage the firearm . . . and keep yourself safe to the extent that that's possible. You don't want to lose sight of a person with a firearm . . . so you would tend to pursue." (Tr. 722) On cross, Lieutenant Modell conceded that it could have also been prudent for Respondent to take a position of cover while keeping his firearm trained on the bathroom. He added that, "It doesn't mean that you shouldn't pursue an individual who you believe has a firearm for the purpose of controlling . . . an active threat. It's not that one course of action is reasonable and the other is necessarily unreasonable." (Tr. 761-64)

It is this tribunal's assessment that Lieutenant Modell's central argument, that Respondent acted reasonably, simply did not hold up against the logical, well-supported and

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fact-based expert testimony of Inspector Sheehan, Inspector Caroli and Sergeant Flynn. Especially unconvincing was his position that Respondent acted legitimately even though he discarded specific Patrol Guide procedures. This tribunal acknowledges that judicious police officers may vary in their approach to apprehension. However, a finder of fact making a determination as to whether police actions are reasonable and justifiable cannot turn a blind eye to this Department's procedures, training and tactics. To a great extent, Lieutenant Modell's testimony fell short of what this tribunal would characterize as considered and well-reasoned because it clashed with applicable Patrol Guide procedures. That Lieutenant Modell's opinions were also formed without even seeing the relevant video footage also casts doubt on his testimony (Tr. 710, 741-42), and supports this tribunal's conclusion that his analytic framework and factual assessment did not merit significant probative weight. In sum, Modell's testimony was unsuccessful in persuading this court that Respondent acted reasonably when he failed to establish a perimeter, rejected the barricaded perpetrator protocol, accelerated the suspect's apprehension and failed to call communications for mandated expert assistance.

In addition to the reasonableness of his actions, Respondent raised numerous other defenses to these charges. None were persuasive. For example, Respondent's counsel asserted in closing, "The whole issue in this case really lends itself to being on the second floor ... the fact that [Respondent] believed he was in hot pursuit." (Tr. 889) This tribunal, however, finds that hot pursuit was lost once the front door locked behind Graham and the officers lost visual contact of him for over three minutes, thus leaving them with no reasonable basis for determining where he was located within this multiple dwelling.

It is well-settled law that when there is probable cause to believe a suspect has committed a crime, that suspect may not defeat an arrest which has been set in motion in a public place, by

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escaping to a private location. *U.S. v. Santana*, 427 U.S. 38, 42-43 (1976). The hot pursuit doctrine, however, applies “when the pursuit is immediate and fairly continuous from the scene of the crime.” *Webster v. City of New York*, 333 F. Supp. 2d 184 (S.D.N.Y. 2004), *citing*, *Welsh v. Wisconsin*, 466 U.S. 740 (1984).

Although Respondent ultimately proceeded to the apartment where Graham was located. I find that his pursuit was not “continuous” because, at the time of the breach, Respondent and his fellow officers did not have particularized knowledge that Graham was in that second floor apartment or even still located within the building. At trial, Respondent agreed that he “only” saw Graham ascending the stairs adjacent to the vestibule and that he had no knowledge about his whereabouts inside the building.²¹ (Tr. 793, 829, 841, 855-57) Officer McLoughlin, who was next to Respondent on the second floor, also conceded that he had no idea where Graham was inside the multiple dwelling. (Tr. 633-34) This conclusion is supported by applicable cases involving multiunit residences. In *U.S. v. Scott*, 520 F.2d 697 (9th Cir. 1975), the court explained, “[a]ccepting that pursuit . . . had brought the officers to the apartment house, this did not render each apartment in it subject to search . . . No apartment was subject to entry in the absence of probable cause to believe that the [suspects] were present in that particular apartment.” New York courts have also employed this rationale. In *People v. Hunter*, 92 A.D.3d 1277 (4th Dep’t 2012), the court rejected the justification of hot pursuit where “the police did not know in which apartment, if any, defendant was located and they forcibly entered

²¹ This assertion contradicted Respondent’s GO-15 interview, where he stated that he and McLoughlin “went up the stairs to the door where we last saw the suspect.” Respondent acknowledged making this statement at trial and suggested that he may have conflated seeing Graham ascending the stairs with his subsequent knowledge that there was a door at the top of the stairs. (Tr. 855-56; see also Dep’t Ex. 25 at 28). The idea that Respondent would have been able to see Graham ascending the stairs and reaching a door at the top of the landing is further called into question by the photos admitted into evidence which make clear that it was not possible for Respondent to make such an observation from outside the front door. (Dep’t Exs. 14-17)

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[the apartment where the defendant was located] as a last resort [after searching other apartments]."

Other primary defenses asserted by Respondent revolve around the argument that he was not responsible for the tactical failings that occurred that day. For example, Respondent affirmed that it was McLoughlin, and not him, who physically kicked in the door of the second floor apartment. Although factually correct, this was not a situation where a member of service merely followed along to protect a fellow officer after an improper entry into a location. In fact, here, it was Respondent who led the SNEU team members to that specific door. It is undisputed that Respondent gained entry into the premises first and let McLoughlin and Crocitto inside. It was also Respondent who immediately rushed up the staircase and made the decision to stop at the door of the second floor apartment. Up to that point, McLoughlin was following Respondent's lead as he unremittingly pursued Graham there, despite lacking any reasonable basis for determining his location.

Moreover, Respondent testified that McLoughlin asked if he was "ready" prior to kicking the door in and that he responded affirmatively, understanding that this meant they were about to proceed inside. Even setting aside the fact that this exchange was not confirmed by the other officers, within the context of these facts, it is the finding of this tribunal that it is more likely than not that the decision to breach the door was jointly made. Accordingly, McLoughlin's singular act of kicking in the door cannot absolve or mitigate Respondent's responsibility for a barricaded person situation mired in inexcusably poor tactics.

For similar reasons, this tribunal rejects Respondent's defense that the presence of an on-scene supervisor inoculated his conduct from reproach. As discussed in more detail above, despite the presence of Sergeant Morris, Respondent put himself in the position of spearheading

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this encounter. This finding is consistent with the FDRB's astute observation that Sergeant Morris "appear[ed] to have followed his officers' lead, failing to prevent the use of poor tactical judgment by his officers." (Dep't Ex. 25 at 46)

I make this finding even after considering Sergeant Morris's testimony that he concurred with Respondent's actions as he attempted to apprehend Graham. First, it should be noted that Respondent testified that he was unaware of his supervisor's whereabouts as he made his way up the stairs to the second floor nor did he seek direction at the door. (Tr. 795) Having made that assertion, this tribunal cannot now credit his defense that he proceeded into the apartment believing he had his supervisor's implicit approval.²² Second, even accepting the Sergeant's testimony that he believed Respondent's chosen course of action was proper, a supervisor's uncommunicated, implicit approval of tactics does not absolve Respondent of his primary obligations as a police officer - to comply with his training, to adhere to the Patrol Guide, to use good judgment and sound tactics - all of which he failed at during the course of this encounter.

Similarly unpersuasive was Respondent's attempt to convince this tribunal that it was the responsibility of others to contact E.S.U. Specifically, the preponderance of the evidence did not support Respondent's testimony that a police officer would "never" call E.S.U. when a supervisor was on the scene, as that would be "breaking the chain of command." (Tr. 811-12) Even if it was more common for supervisors to request the response of E.S.U., it is clear that at every other point of this particular encounter, Respondent was not waiting for direction or action from Sergeant Morris.

²² Departmental charges are presently pending against Sergeant Morris for (i) failing, after being notified of an observation of a man with a firearm, to notify communications of the pick-up assignment, as required; (ii) failing to ensure that all personnel assigned to the SNEU operation performed their duties in regulation uniform and that the minimum number of qualified members were present to conduct the SNEU operation and (iii) failing to supervise members of the SNEU team during a police incident involving the entry into a residence by failing to give direction to the team.

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Respondent also attempted to justify his failure to comply with Patrol Guide 212-38 by arguing that he was not confronting a barricaded person situation. He acknowledged that, standing outside the locked apartment door, he "considered" this protocol, but ultimately rejected its applicability. He explained that his training around barricaded persons revolved around emotionally disturbed persons who were off medication or at risk for suicide. He further characterized a barricaded situation as one where "the person is in a place with no one else and no egress...if this room had no windows and no other door and I was standing outside that door, this person would be isolated and contained." He did not think Graham fit this criteria. (Tr. 798-99)²³ It is apparent to this tribunal that Respondent had no actual justification for his failure to adhere to the barricaded procedure and, as such, attempted to shift the focus onto emotionally disturbed persons and then, incredibly, tried to restrict the meaning of "barricaded" to one that lacked common sense or logic.

Moreover, Respondent's unreasonably restrictive characterization of a barricaded person had no credible support in the record. Sergeant Flynn of E.S.U. specifically explained that in a situation with an individual behind a locked door, "we would not call that a mobile individual, we would call it a barricaded perp." (Tr. 602) Even Respondent's expert conceded on cross-examination that it could have been reasonable to treat Graham as a barricaded perpetrator. (Tr. 754) Although Respondent is correct that the Patrol Guide does not define "barricaded," the weight of the credible expert testimony supports a finding that Respondent made an egregious tactical error by rushing into the premises and the second floor apartment instead of treating this

²³ On cross-examination, however, Respondent contradicted his position that Graham was not barricaded by stating that he pursued Graham into the bathroom to prevent him from "taking up a more barricaded situation." He clarified though that, based on his training, he still did not consider Graham to be barricaded because he was not contained in the bathroom in that he was mobile and not precluded from moving throughout the apartment. (Tr. 852-53)

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as a barricaded person scenario requiring notifications to E.S.U. and other specialized teams.²⁴
 (See Tr. 321, 344-45, 358, 470, 602)

Based on the entirety of the record I find that Respondent did in fact exercise poor tactical judgment that lead to an avoidable firearm discharge, with the intent to cause serious bodily harm, and ultimately resulted in the death of Ramarley Graham. Accordingly, I find Respondent guilty of the misconduct charged in Specifications 1 and 2.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on July 8, 2008. He has no prior formal disciplinary record. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Police officers are vested with substantial power and authority, including the right to use force which can result in the loss of life. With that grave power comes the responsibility of bringing to bear objectively reasonable judgment. Here, Respondent's actions fell far short of this standard and, as a result, an 18-year-old lost his life in his own home.

²⁴ As noted above, the record established that this SNEU team was in violation of three directives set forth in Administrative Guide Procedure 316-36, now incorporated into Patrol Guide 212-116. Specifically, the team was short one member, neither Respondent nor McLoughlin were SNEU trained and required personnel were not in uniform. This tribunal agrees with the parties that Respondent was not responsible for these three violations. For the reasons set forth below, I find that these procedural violations do not shield Respondent from his responsibility with regard to tactics.

- a. Although Respondent was not in uniform, the record supports a finding that Graham knew he was being pursued by the police. Not only did the officers wear jackets emblazoned with the words "POLICE" on the front and "NYPD POLICE" on the back, there is evidence in the record that Graham told his grandmother that the police were "chasing him for no reason" (Dep't Ex. 25 at 15, 42). Thus, it is unlikely that this violation had a significant effect on the operation.
- b. The impact of this SNEU team having six members, instead of seven, is difficult to ascertain based on this record. It is unlikely, however, that the presence of another officer would have obviated Respondent's obligation to request the response of E.S.U. and comply with the barricaded person's procedure.
- c. The most troubling violation was that Respondent and McLoughlin were not SNEU trained. Nonetheless, the preponderance of the credible evidence established that Respondent was appropriately trained in the procedures and proper tactics for barricaded persons. Therefore, this administrative violation does not mitigate Respondent's culpability.

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As set forth in detail above, Respondent is accountable for multiple tactical errors that recklessly forced the confrontation resulting in a fatal shooting. Without a reasonable basis for believing that Ramarley Graham was inside that second floor apartment, he steered the charge to that location, ignoring other potential dangers and disregarding his police training. Respondent compounded error after tactical error, dangerously leading other members of service without the required specialized personnel, suitable preparation or the appropriate equipment needed, and then recklessly confronted a barricaded suspect he believed to be armed. Respondent caused a fast moving situation that jeopardized the lives of officers and civilians, which culminated in the death of Ramarley Graham.

This series of tactical blunders was extraordinarily glaring and precipitated the tragic outcomes at the heart of this case. The tribunal was especially troubled by Respondent's own trial testimony assessing the manner in which he chose to proceed that day. After five years of admitted self-reflection, at trial, Respondent not only denied using poor tactics, but described his tactical choices as "the best representation of my training and experience." (Tr. 823) Based on this record, it is clear to this tribunal that this particular Respondent can no longer be entrusted to carry out the duties and responsibilities of a New York City police officer.

In making this finding, I note that the facts and findings in this case are most akin to those in *Disciplinary Case No. [REDACTED]*, where a ten-year detective, with no disciplinary history and an otherwise solid employment record, was dismissed from the Department having been found guilty of: (i) undertaking enforcement action while undercover and unnecessarily stopping and engaging suspects, thereby placing his safety and that of others in jeopardy; and (ii) discharging his firearm outside Department guidelines. While the shooting in the instant case was found to be within guidelines, there are still striking similarities with

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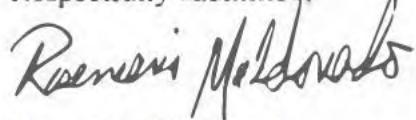
regard to poor tactics. The cited case discussed at length the detective's "highly questionable tactical actions" in the moments before the shooting and stressed that the "problem with [the detective's] decision to fire his weapon goes back to the tactics he employed." (Decision at 89, 98) Much like the instant matter, the trial commissioner found that the detective declined to proceed cautiously, opted not to wait for back-up and attempted to apprehend a suspect. positioning himself in a way that left with him without cover and made him an "inviting target." (*Id.* at 91, 96-98) Noting the importance of setting aside the benefits of hindsight, and acknowledging the detective's argument that he made a split-second, "life-or-death" decision, the tribunal found that the exigency was of his own making and that a reasonable officer in that respondent's position would have proceeded very differently. (*Id.* at 94-99) In recommending dismissal, the trial commissioner noted that the respondent recklessly "failed to utilize reasonable judgment with horrific results," making it "clear that [he] lacks the judgment to serve as a police officer." (*Id.* at 101-02) The same is true in the instant case.

This tribunal has reviewed the cases cited by Respondent in support of their argument that a finding of guilt in this case does not warrant termination from the Department. I disagree. Respondent's dereliction of core Department procedures and tactics was repeated, flagrant and avoidable. Moreover, his blatant disregard of NYPD procedures and tactics had deadly consequences – a factor this tribunal will not overlook. In fact, it is the egregiousness and recklessness of Respondent's multiple tactical failures, his lack of insight concerning those errors, and the resulting death, that distinguish this case from those cited by Respondent's counsel.

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Having considered relevant precedent, in conjunction with the arguments, case law, and evidence presented at trial, it is recommended that Respondent be DISMISSED from the New York City Police Department.

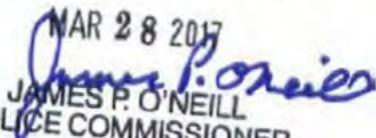
Respectfully submitted,



Rosemarie Maldonado
Deputy Commissioner Trials

APPROVED

MAR 28 2017



JAMES P. O'NEILL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER RICHARD HASTE
TAX REGISTRY NO. 947066
DISCIPLINARY CASE NO. 2012-7616

Respondent was appointed to the Department on July 8, 2008. On his last three annual performance evaluations for 2014, 2015 and 2016, he received 4.0 overall ratings of "Highly Competent." [REDACTED]

Respondent has no prior disciplinary history. He was placed on Level 1 Force monitoring from August 26, 2010, to July 16, 2012, for having received three or more CCRB complaints in a one-year period. Following his suspension related to the incident that is the subject of this case, he was monitored from June 13, 2012, to July 13, 2012. On July 16, 2012, Respondent was upgraded to Level 2 Discipline monitoring, which remains ongoing.

For your consideration.

Rosemarie Maldonado
Deputy Commissioner Trials